

THIS OPINION WAS NOT WRITTEN FOR PUBLICATION

The opinion in support of the decision being entered today (1) was not written for publication in a law journal and (2) is not binding precedent of the Board.

Paper No. 25

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte EDWARD K. GRAOPSKI and JAMES A. DESNOYERS

Appeal No. 1996-1792
Application No. 08/220,244¹

HEARD: December 9, 1999

Before PAK, WALTZ, and KRATZ, *Administrative Patent Judges*.

KRATZ, *Administrative Patent Judge*.

DECISION ON APPEAL

¹ Application for patent filed March 30, 1994.

This is a decision on appeal from the examiner's final rejection of claims 1 through 17, which are all of the claims pending in this application.

BACKGROUND

Appellants' invention relates to a bottle having a molded wall comprising three layers of the same resin with the intermediate layer including a black colorant that renders that layer opaque to light transmission. The inner and outer layers each include a white colorant to mask the black coloration of the intermediate layer. A method of forming such a bottle is also claimed. According to appellants, the claimed bottle "provides a clean white, aesthetically pleasing appearance" while being "an effective barrier to light transmission" so as to be useful for storing light sensitive material, such as some medicaments (brief, page 3). The masked black colored opaque middle layer may include recycled resins (brief, page 3). An understanding of the invention can be derived from a reading of exemplary claim 1, which is reproduced below.

1. A bottle for protecting its associated contents from degradation due to light, said bottle having an integrally molded wall having three layers of the same synthetic resin, each of said layers including a colorant, the colorant of said intermediate layer providing a black opaque coloration substantially opaque to light transmission, and the colorant of the inner and outer layers providing a white opaque coloration masking said black coloration of said intermediate layer to provide an apparently uniform coloration for the inner and outer surfaces of said wall and concealing the multilayer character of said wall.

The prior art references of record relied upon by the examiner in rejecting the appealed claims are:

Smith et al. (Smith)	4,482,586	Nov. 13, 1984
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Darr et al. (Darr),	WO 93/15887	Aug. 19, 1993
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Claims 1-17 stand rejected under 35 U.S.C. § 103 as being unpatentable over Smith or, alternatively, Smith in view of Darr.

OPINION

We have carefully considered all of the arguments advanced by appellants and the examiner and agree with appellants that the aforementioned rejections are not well founded. Accordingly, we reverse the stated rejections.

At the outset, we note that the examiner has the initial burden of presenting a *prima facie* case of obviousness based on the disclosure of the applied prior art. See *In re Oetiker*, 977 F.2d 1443, 1445, 24 USPQ2d 1443, 1444 (Fed. Cir. 1992).

Smith discloses a multi-layer bottle made of polyester material including "at least one layer of polyisophthalate

material or a copolymer thereof" and at least one nonpolyisophthalate layer which may comprise "polyterphthalate polyester material or a copolymer thereof" (column 2, lines 62-66 and column 5, lines 10-21). Smith teaches the layers may be colored (column 5, lines 21-25 and column 10, line 43 through column 11, line 3). The bottle of Smith allegedly has good permeability resistance to oxygen and carbon dioxide.

Darr discloses a multi-layer plastic container including: (1) an inside layer of virgin plastic; (2) an inner intermediate layer of recycled plastic of a relatively dark color, such as green; (3) an outer intermediate layer of plastic that may include titanium dioxide so as to hide (be opaque to) the darker color of the inner intermediate layer; and (4) an outer pigmented layer of a lighter color, such as orange. Darr does not disclose that the inner intermediate layer is opaque to light transmission and colored black.

Regarding the § 103 rejection over Smith alone, it is basically the examiner's position that it would have been obvious to select the colorants of multiple layers in Smith "for a desired effect" so as to arrive at the claimed invention "[s]ince changing color in an article does not impart

patentability" (answer, page 4). With regard to the alternative § 103 rejection over Smith in view of Darr, the examiner concludes that using "non recycled HDPE instead of recycled HDPE would have been obvious ... depending on the properties desired in the resultant container" (answer, page 4).

However, the examiner has not adequately explained how Smith alone or in combination with Darr would have suggested the claimed three layer bottle arrangement made of the same resin, especially the claimed light transmission resistant black inner layer sandwiched between color opaque white outer layers. As already noted above, Smith does not teach the use of layers made of the same resins, nor does Smith teach the claimed light transmission resistant black inner layer. Although Darr teaches the use of the same resin for different layers, Darr does not teach or suggest forming the claimed light transmission resistant black inner layer.

The examiner simply has not furnished any reasonable explanation as to how the individual teachings of Smith and Darr are proposed to be combined so as to arrive at the claimed invention.

In our view, the examiner's stated rejections fall significantly short of presenting a *prima facie* case of obviousness for the reasons set forth above.

Since we find that the examiner has not established a *prima facie* case of obviousness, we need not reach the issue of the sufficiency of the showing of the secondary evidence furnished by appellants. See *In re Geiger*, 815 F.2d 686, 688, 2 USPQ2d 1276, 1278 (Fed. Cir. 1987).

Accordingly, we will not sustain the examiner's § 103 rejections.

CONCLUSION

To summarize, the decision of the examiner to reject claims 1-17 under 35 U.S.C. § 103 as being unpatentable over Smith or, alternatively, Smith in view of Darr is reversed.

REVERSED

CHUNG K. PAK)	
Administrative Patent Judge)	
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)	
)	
)	BOARD OF PATENT
THOMAS A. WALTZ)	APPEALS
Administrative Patent Judge)	AND
)	INTERFERENCES
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)	
PETER F. KRATZ)	
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